Muhibbah Engineering (M) Bhd v Ketua Pengarah Hasil Dalam Negeri

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-349–08 OF 2020
MOHAMAD ZABIDIN, LEE HENG CHEONG AND GUNALAN MUNIANDY JJCA
31 MAY 2022

Civil Procedure — Judicial review — Appeal against decision in dismissing leave for judicial review — Whether High Court judge had erred in law in dismissing appellant's application for leave to apply for judicial review

This was an appeal by the appellant against the decision of the learned High Court judge in dismissing the appellant's application for leave for judicial review ('appellant's application for leave') against the respondent. The appellant was a public listed company incorporated in Malaysia, principally engaged in the business of providing oil and gas, marine, infrastructure, civil and structural engineering contract work. The respondent concluded its tax audit and issued its preliminary audit finding letter to the appellant. The respondent disallowed the deduction of the project accrued expenses and adjusted the losses that the appellant surrendered for group relief to its related company, Muhibbah Marine Engineering Sdn Bhd in years of assessment 2015 and 2016 on the basis that the project accrued expenses were provisional in nature. The appellant provided supporting documents and explained to the respondent that the project accrued expenses were expenditure that the appellant had incurred in relation to the works carried out by its subcontractor in the years of assessment 2015 and 2016. The respondent informed the appellant that it maintained its audit findings and revised tax computations. The appellant emphasised that the project accrued expenses were deductible under s 33(1) of the Income Tax Act 1967 ('the ITA') and the respondent had no basis to invoke both subsections of s 44A(9) of the ITA. The respondent issued the notices of assessment for years of assessment 2015 and 2016 and notification of non-chargeability for year of assessment 2017 ('the decision'). The respondent's decision was the subject of the judicial review application filed by the appellant. The High Court dismissed the appellant's application for leave and hence this appeal.

Held, allowing the appeal:

(1) As the appellant had raised issues of illegality and unlawful treatment by the respondent in regard to its impugned decision, the judicial review ('JR') proceeding should be made available to the appellant and should

not be considered an abuse of the court process to preclude the appellant from seeking the reliefs sought at the full hearing on the merits. The decision being challenged in this appeal was the dismissal of the application for leave to apply for JR and not a decision at the substantive hearing of the action. The court hearing the JR should not determine at the leave stage itself whether this was an exceptional case for judicial intervention when the alternative remedy had not been exhausted. An important issue of law had been raised as to the correctness of the respondent's to decision impose the penalty in question on the appellant and as to whether this was an exceptional case amenable to JR and this was a question that should properly be addressed and decided at the substantive stage on merits. The appellant's case as presented was patently an arguable case that should succeed at least at the leave stage. The appellant ought to be allowed to proceed to the substantive stage to ventilate the issues of law raised for serious consideration and not to be shut out at the preliminary stage (see paras 15, 21 & 25).

(2) The appellant had satisfactorily made out an arguable case of the respondent having committed an error of law and possibly having exceeded its jurisdiction devoid of any legal or factual basis as alleged. As the appellant had raised serious question of law and/or excess of jurisdiction by the respondent in regard to its impugned decision, the JR application should proceed, beyond the leave stage and should not be rejected summarily on the basis that the issues in dispute should be resolved by the Special Commissioners of Income Tax ('SCIT') on appeal. The availability of an alternative remedy, namely, the SCIT for the appellant to seek redress for its dissatisfaction with the assessment should not by itself deny the appellant to seek leave for JR when issues of law of some significance tantamount to excess of jurisdiction were raised. As to whether this was an exceptional case amenable to JR was a substantive issue that should be adjudicated at the full substantive hearing of the JR and not at the preliminary stage. It was premature for the respondent to object the appellant's application for leave on the availability of domestic remedy at the leave stage (see paras 36 & 38–39).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan hakim Mahkamah Tinggi yang bijaksana dalam menolak permohonan perayu untuk kebenaran semakan kehakiman ('permohonan perayu untuk kebenaran') terhadap responden. Perayu adalah sebuah syarikat tersenarai awam yang diperbadankan di Malaysia, terutamanya terlibat dalam perniagaan penyediaan minyak dan gas, marin, infrastruktur, kerja kontrak kejuruteraan struktur dan awam. Responden telah memutuskan pengauditan cukainya dan mengeluarkan surat penemuan audit awalnya kepada perayu. Responden tidak membenarkan potongan perbelanjaan terakru projek dan melaraskan kerugian yang

diserahkan oleh perayu untuk pelepasan kumpulan kepada syarikat berkaitannya, Muhibbah Marine Engineering Sdn Bhd pada tahun taksiran 2015 dan 2016 atas dasar perbelanjaan terakru projek adalah bersifat sementara. Perayu menyediakan dokumen sokongan dan menjelaskan kepada responden bahawa perbelanjaan terakru projek adalah perbelanjaan yang telah ditanggung oleh perayu berhubung dengan kerja-kerja yang dijalankan oleh subkontraktornya pada tahun taksiran 2015 dan 2016. Responden memaklumkan perayu bahawa ia mengekalkan penemuan audit dan pengiraan cukai yang disemak semula. Perayu menegaskan bahawa perbelanjaan terakru projek boleh ditolak di bawah s 33(1) Akta Cukai Pendapatan 1967 ('ACP') dan responden tidak mempunyai asas untuk menggunakan kedua-dua subseksyen ss 44A(9) ACP. Responden mengeluarkan notis taksiran untuk tahun taksiran 2015 dan 2016 dan pemberitahuan tidak boleh dikenakan cukai bagi tahun taksiran 2017 ('keputusan'). Keputusan responden adalah subjek permohonan semakan kehakiman yang difailkan oleh perayu. Mahkamah Tinggi menolak permohonan perayu untuk kebenaran dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Memandangkan perayu telah membangkitkan isu perlakuan yang tidak sah dan menyalahi undang-undang oleh responden berhubung dengan keputusannya yang dipersoalkan, prosiding semakan kehakiman ('JR') harus disediakan kepada perayu dan tidak boleh dianggap sebagai penyalahgunaan proses mahkamah untuk menghalang perayu daripada mendapatkan relif yang dipohon pada perbicaraan penuh dengan merit. Keputusan yang dicabar dalam rayuan ini ialah penolakan permohonan kebenaran untuk memohon JR dan bukannya keputusan pada pendengaran substantif tindakan itu. Mahkamah yang mendengar JR tidak sepatutnya menentukan pada peringkat kebenaran itu sendiri sama ada ini adalah kes luar biasa untuk campur tangan kehakiman apabila remedi alternatif belum digunakan. Isu undang-undang yang penting telah dibangkitkan tentang ketepatan keputusan responden mengenakan penalti yang dipersoalkan ke atas perayu dan sama ada ini adalah kes luar biasa yang boleh diterima pakai oleh JR dan ini merupakan persoalan yang harus ditangani dan diputuskan dengan sewajarnya di peringkat substantif dengan merit. Kes perayu seperti yang dibentangkan secara jelas merupakan kes yang boleh dipertikaikan yang sepatutnya berjaya sekurang-kurangnya pada peringkat kebenaran. Perayu sepatutnya dibenarkan untuk meneruskan ke peringkat substantif untuk menyuarakan isu undang-undang yang dibangkitkan untuk pertimbangan serius dan tidak ditutup pada peringkat awal (lihat perenggan 15, 21 & 25).

(2) Perayu telah dengan memuaskan menyatakan kes yang boleh dipertikaikan responden telah melakukan kesilapan undang-undang dan

mungkin telah melampaui bidang kuasanya tanpa sebarang asas undang-undang atau fakta seperti yang didakwa. Memandangkan perayu telah membangkitkan persoalan serius mengenai undang-undang dan/atau lebihan bidang kuasa oleh responden berkenaan dengan keputusan yang dipertikaikan, permohonan JR harus diteruskan, di luar peringkat kebenaran dan tidak boleh ditolak secara ringkas atas dasar bahawa isu yang dipertikaikan harus diselesaikan oleh Pesuruhjaya Khas Cukai Pendapatan ('PKCP') dengan rayuan. Ketersediaan remedi alternatif, iaitu, PKCP untuk perayu mendapatkan ganti rugi atas ketidakpuasan hati terhadap taksiran itu tidak seharusnya dengan sendirinya menafikan perayu untuk mendapatkan kebenaran untuk JR apabila isu undang-undang yang mempunyai kepentingan yang sama dengan lebihan bidang kuasa dibangkitkan. Sama ada ini adalah kes luar biasa yang boleh diterima pakai oleh JR adalah isu substantif yang harus diputuskan pada pendengaran substantif penuh JR dan bukan pada peringkat awal. Adalah terlalu awal bagi responden untuk membantah permohonan perayu untuk kebenaran mengenai ketersediaan remedi domestik pada peringkat kebenaran (lihat perenggan 36 & 38–39).]

Cases referred to

Bursa Malaysia Securities Bhd v Gan Boon Aun [2009] 4 MLJ 695, CA (refd)
Chin Mee Keong & Ors v Pesuruhjaya Sukan [2007] 6 MLJ 193, CA (folld)
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] CLJ Rep 110, SC (folld)
Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 429, CA (refd)
Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor [2015] 1 MLJ 675; [2014] 9 CLJ 321, CA (refd)
JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134; [1986] CLJ Rep 160, SC (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Metacorp Development (Civil Appeal No W-01–239–11) (unreported), CA (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748 (refd)
Mohamed Nordin bin Johan v Attorney-General, Malaysia [1983] 1 MLJ 68; [1983] CLJ Rep 271, FC (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (folld)
Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri [2018] 1 MLJ 376, CA (distd)

Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442, SC (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (refd)

Legislation referred to

Income Tax Act 1967 ss 33(1), 44A(9), (9)(a), (9)(b), 91, 99

Appeal from: Application for Leave for Judicial Review No WA-25–71–01 of 2020) (High Court, Kuala Lumpur)

S Saravana Kumar (with Sophia Choy and Chew Ying) (Rosli Dahlan Saravana Partnership) for the appellant.
Krishna Priya a/p Veenagopal (Senior Federal Counsel, Attorney General's Chambers); Ridzuan bin Othman (Inland Revenue Board of Malaysia) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] Muhibbah Engineering Sdn Bhd ('Muhibbah'), the taxpayer/appellant, a well-known published listed company, has brought this appeal against the decision of the learned High Court judge ('LHCJ') dated 27 July 2020 to dismiss the appellant's application for leave for judicial review dated 29 January 2020 ('appellant's application for leave') against the revenue/respondent ('respondent').

[2] The sole issue for our determination in this appeal was whether the LHCJ had erred in law in her decision to dismiss the appellant's application for leave to apply for judicial review.

FACTUAL BACKGROUND

[3] The appellant is a public listed company incorporated in Malaysia, principally engaged in the business of providing oil and gas, marine, infrastructure, civil and structural engineering contract work.

[4] On 3 July 2019, the respondent concluded its tax audit and issued its preliminary audit finding letter to the appellant. The respondent disallowed the deduction of the project accrued expenses and adjusted the losses that the appellant surrendered for group relief to its related company, Muhibbah Marine Engineering Sdn Bhd ('MME') in years of assessment 2015 and 2016 on the basis that the project accrued expenses are provisional in nature.

[5] From 1 August 2019 to 13 December 2020, the appellant provided supporting documents and explained to the respondent that the project accrued expenses are expenditure that the appellant had incurred in relation to the works carried out by its subcontractor in the years of assessment 2015 and 2016

[6] On 7 January 2020, the respondent informed the appellant that it maintained its audit findings and revised tax computations. On 14 January 2020, the appellant emphasised that the following:

(a) the project accrued expenses are deductible under s 33(1) of the Income Tax Act 1967 ('the ITA'); and

(b) the respondent has no basis to invoke both subsections of s 44A(9) of the ITA.

[7] On 20 January 2020, the respondent issued the notices of assessment ('Form J' and 'Form G') dated 17 January 2020 for years of assessment 2015 and 2016 and notification of non-chargeability ('NONC') for year of assessment 2017 dated 20 January 2020 ('decision').

[8] The respondent's decision was the subject of the judicial review application filed by the appellant on 29 January 2020.

[9] On 27 July 2020, the High Court dismissed the appellant's application for leave.

OUR DECISION

[10] We must at the outset set out the grounds for the High Court's decision to dismiss the application for leave which are these:

(a) there is a dispute on facts and that the matter should be referred to the Special Commissioners of Income Tax ('SCIT') for the factual matrix to be ascertained; and

(b) there are no exceptional circumstances that would warrant the grant of leave as there is a statutory appeal provided under ss 99 and 44A(9)(b) of the ITA.

[11] It was acknowledged by the appellant themselves that s 99 of the ITA provides an alternative remedy for aggrieved taxpayers to appeal to the SCIT against an assessment issued by the respondent. However, the appellant took the position that the provision for the said alternative remedy was not a bar to the aggrieved tax payer. In this regard, the appellant reiterated that the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185;

[1987] CLJ Rep 110 had recognised that judicial review is available even where there is an alternative remedy in the following exceptional circumstances:

(a) clear lack of jurisdiction; or

(b) blatant failure to perform statutory duty; or

(c) a serious breach of the principles justice of natural justice.

[12] Upon being brought to our attention, we have noted that the Court of Appeal had unanimously upheld the High Court's decision in *Ketua Pengarah Hasil Dalam Negeri v Metacorp Development* (Civil Appeal No W-01–239–11) (unreported) that the High Court has the jurisdiction to hear the taxpayer's application notwithstanding the existence of a domestic remedy of an appeal to the SCIT. The Director General of Inland Revenue ('DGI')'s leave application was dismissed by the Federal Court.

[13] On the law as it stands, leave for judicial review should be granted in tax cases in various circumstances despite the existence of an appellate structure in the legislative structure before recourse to judicial remedies. The non-exercise of the internal appeal procedure is no bar to a judicial review application. This was made clear in *Government of Malaysia & Another v Jagdis Singh* which in our view, is still good law.

[14] Where there is basis for a complaint of illegality or unlawful treatment by the public body concerned, the court hearing the judicial review action cannot impose on the applicant the requirement of his statutory right of appeal. Our attention on this crucial point was drawn to *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 where the Federal Court had discussed the issue and held that the society's judicial review ('JR') application was not barred by its non-exercise of the internal appeal procedure as follows:

> Speaking generally, it is right to say, that if an applicant in judicial review proceedings can demonstrate illegality, that is to say unlawful treatment, it would be wrong to insist that he exhaust his statutory right of appeal where one is available. Why should illegal action be not nipped in the bud by the quicker, more convenient and adequate remedy of JR rather than appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest. (*R v Huntingdon DC, ex p Cowan* [1984] 1 WLR 501 (a licensing appeal)).

[15] In this instance, the statutory appeal procedure is as laid down in ss 99 and 44A(9)(b) of the Income Tax Act ('the ITA'). In our considered view, as the appellant had raised issues of illegality and unlawful treatment by the respondent in regard to its impugned decision, the JR proceeding should be made available to the appellant and should not be considered an abuse of the

court process to preclude the appellant from seeking the reliefs sought at the full hearing on the merits.

[16] In opposition to the appellant's proposition on this primary issue, the respondent's basic premise was that the court should not entertain the JR application and reject it in limine as, otherwise, it would mean that the appellant is bypassing the SCIT as decided in the case of *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 where Azmi LP said:

> In *Comptroller of Income Tax v A Co Ltd* Choor Singh J summed up the law in such lucid terms that I need no more than echo the following words of His Lordship with which I respectfully agree:
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> > ... A taxpayer has no right to bypass the Board of Review and take his complaint direct to court. And when the Comptroller of Income Tax sues a taxpayer to recover tax due under a notice of assessment, the taxpayer cannot be heard to say that the assessment on which tax has been levied was not made in accordance with the provisions of the Ordinance. Such a complaint must in the first instance be laid before the Board of Review. The provisions of Order XIV of the Rules of the Supreme Court must be read together with the provisions of the Income Tax Ordinance. If this is not done every unwilling taxpayer will refuse to pay tax and when sued in court, will challenge the merits of the assessment, thus causing considerable delay in the collection of the tax. The proper course for every aggrieved taxpayer is to pay his tax and present his arguments against the assessment made upon him before the Board of Review.
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> In place of a Board of Review we now have the Special Commissioners of Income Tax. It is open to a taxpayer to go before them and prove that he is not liable to assessment. The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.

[17] The respondent also relied on the trite principle that in a JR the High Court merely exercises its supervisory jurisdiction over public authorities in relation to their decision-making and process and will not normally examine the merits of the decision save when exceptional circumstances are demonstrated by the applicant. Reliance was placed squarely on the decision of the Supreme Court in *Government of Malaysia v Jagdis Singh* where the relevant passage of the judgment reads that:

> A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.
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> *In Re Preston* was a tax case. It was quite clear from the speeches of their Lordships

in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

[18] It was submitted that, thus, for the appellant to succeed in a JR application, the appellant must show that the respondent's process of decision making is tainted with illegality, irrationality, or unreasonableness which enables the appellant to apply for the decision to be quashed by the court which the respondent contended the appellant had failed to do so.

[19] As pointed out by the respondent, in that case, the Supreme Court decided to dismiss a taxpayer's JR application to quash a notice of assessment raised by the DGIR under s 91 of the ITA 1967 on the ground that even though the discretion still lies with the court to act by way of judicial review in revenue cases, certiorari will not typically be issued unless the applicant could prove that there is an apparent lack of jurisdiction or blatant failure to perform some statutory duty or there is a severe breach of principles of natural justice.

[20] It was further submitted that the irregularity of decision-making process is one of the paramount considerations for the court to intervene and quash the DGIR's decision in the form of the notices of assessment issued against the appellant and there was no detectable defect in the respondent's decision-making process in this instance.

[21] We must pause here to note that the decision being challenged in this appeal is the dismissal of the application for leave to apply for JR and not a decision at the substantive hearing of the action. According to the respondent even at the leave stage, the appellant is required to prove a breach of natural justice. Reference was made to *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1, where the Federal Court held:

(4) There are certain classes of cases such as planning, employment and tax cases whereby a statute provides for a special appeal procedure, and so the courts understandably may not grant judicial review. However, this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of natural justice.

[22] In this case, as the appellant had been given ample opportunity to explain why the respondent should not raise the assessments which is the subject of the appellant's dissatisfaction, the latter's argument was that there was no question of denial of natural justice to the appellant. As such, it was submitted that there was no flaw in the respondent's decision-making process to warrant a JR application and the correct recourse available to the appellant

to seek a remedy was the appeal route under s 99 of the ITA 1967. Any decision of the SCIT is subject to appeal to the High Court, thereby, providing an avenue to the appellant to seek redress.

[23] As there was an alternative remedy available to the appellant, the respondent further argued that the JR application should not be allowed to proceed beyond the leave stage unless where exceptional circumstances are shown (see *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] MLJU 429). Also, that the court would rarely intervene in the respondent ('DGIR')'s decision and that there were only two critical decisions where the court did intervene and the facts of the said cases were distinguishable from the present facts. Among these is the Court of Appeal case of *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLJ 376 where the Court of Appeal held that the DGIR has no basis in law to issue the notices of assessment and the decision to issue the notices was illegal and without jurisdiction.

[24] Hence, where there was an issue of jurisdiction and legality, the JR application was successful. The question here before us is whether the present JR proceeding should not be allowed to proceed past the leave stage and the applicant should be pre-empted from raising issues of law on the pretext that the disagreement here revolves around whether the item 'project accrued expenses' claimed by the appellant is deductible under s 33(1) of the ITA 1967, and, whether penalty under s 44A(9)(b) of the ITA 1967 was correctly imposed on the appellant. The respondent's decision in this case, was clearly within his province to determine. As such, the respondent submitted that the dispute could be decided by the SCIT on appeal by recourse to the alternative remedy under the ITA.

[25] With respect, we are unable to agree with the contention of the respondent that the court hearing the JR should determine at the leave stage itself whether this is an exceptional case for judicial intervention when the alternative remedy had not been exhausted. To our minds, an important issue of law has been raised as to the correctness of the respondent's to decision impose the penalty in question on the appellant and as to whether this is an exceptional case amenable to JR and this is a question that should properly be addressed and decided at the substantive stage on merits. Contrary to the respondent's contention, we are in agreement with the appellant that its case as presented is patently an arguable case that should succeed at least at the leave stage. We are inclined to allow the appellant to proceed to the substantive stage to ventilate the issues of law raised for serious consideration and not to be shut out at the preliminary stage.

[26] It is trite that there is no hard and fast rule that the issue of the existence of alternative remedies should be dealt with and adjudicated at the leave stage summarily. Granted that the issue could constitute a ground for refusing leave. We take cognisance that the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 held:

> Before considering this question, we would like to make a preliminary observation regarding the stage at which the question of alternative remedies should be dealt with. There is no hard and fast rule about this. As we have said, the case of *R v Secretary of State for the Home Department ex p Swati* (ibid) shows that the existence of alternative remedies would be a ground for refusing leave to apply for judicial review. It is also a ground for setting aside a grant of leave given earlier. (*R v Secretary of State* for the *Home Department ex p. Davendranath Doorga* [1990] COD 109). Again, the alternative remedies argument may be considered at the inter partes stage, even if leave had been granted and not challenged (*R v Brentford General Commissioners, ex p Chan* [1986] STC 65. At the final hearing stage, the court can consider the alternative remedies objection as a preliminary point (*R v Chief Adjudicating Officer, ex p Bland*, The Times 6 February 1985) or at a later stage (see, eg *R v Epping and Harlow General Commissoners, ex p Goldstraw* [1983] 3 All ER 257).

[27] We fully associate ourselves with the approach adopted by the Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532 and *Chin Mee Keong & Ors v Pesuruhjaya Sukan* [2007] 6 MLJ 193 where it was remarked that:

(a) *QSR Brands*

> The very first point that we would make is that arguments such as the availability of an alternative remedy go to the merits of the substantive application for JR and ought never to be dealt with at the leave stage. The sole question at the leave stage is whether the application is frivolous.
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> In the light of the settled approach to be taken at the leave stage, we are of the respectful view that the learned judge erred in dealing with the alternative remedy argument at the leave stage. She should have curbed the enthusiasm of counsel for the respondents by informing them that the alternative remedy point is one that she was not prepared to deal with in limine but that it would have to be properly taken and dealt with at the hearing of the substantive motion.
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> The existence of an alternative remedy does not automatically and without more oust the court's JR jurisdiction. The proper approach is for judicial review court to take into account the availability of the alternative remedy in deciding whether to exercise its discretion to grant relief on substantive application.

(b) *Chin Mee Keong*

In fact as there was no affidavit in reply the appellants should have won hands down in the circumstances of the case. Surely purpose of leave would be defeated if such a substantive matter such as this must be resolves at such an early stage. Recently too, in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 the Court of Appeal, when dealing with a similar issue, had ruled that the question of exhaustion of domestic remedy was not an issue at the leave stage. The issue of alternative remedy went to the merit of the substantive application, with the court only to gauge whether the application before it was frivolous or not.

[28] The approach that was taken by the Court of Appeal in two decisions, which we are convinced is correct is well summarised in *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695 as follows:

> Two decisions of the Court of Appeal are noteworthy of mention here. In *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 56 the Court of Appeal refers to a two stage process where an application for leave is made and at the leave stage the High Court should not go into the merits of the cases. In *QSR Brand Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532 two points require mention. The first point for mention is that arguments such as the availability of an alternative remedy go to the merits of the substantive application and ought not to be dealt with at the leave stage.

[29] We are in agreement with the view of the Court of Appeal in the above decision that the issue of the existence of an alternative remedy under statute should be canvassed and decided at the substantive stage of an applicant's JR application. It is to prevent the merits of the substantive application from being dealt with at the early stage of the leave application wherein the applicant is merely required to show on arguable case as to any error of law, excess of jurisdiction or procedural irregularity committed by the public body concerned.

[30] A summary of the LHCJ's GOJ for rejecting leave extracted from the respondent's submission is as follows:

(a) as the appellant filed an appeal to the SCIT, they ought to proceed with their appeal to the SCIT;

(b) the appellant has not exhausted the domestic remedy available under the ITA 1967;

(c) the appellant has failed to demonstrate exceptional circumstances for the court to grant leave;

(d) the appellant's challenge is primarily questioning the merits of the assessments which involved the question of facts to be determined by the SCIT;

(e) there was no issue of lack of jurisdiction when the respondent issued the notices of assessment; A

(f) the appellant has failed to show an excess or abuse of power or breach the rules of natural justice;

(g) the respondent has legally raised the assessments; and B

(h) the SCIT is a proper forum to determine whether the assessments raised by the respondent are correct or not.

[31] As can be seen, the decision of the LHCJ is based on two principal grounds, namely: C

(1) the existence of a domestic remedy which the appellant had yet to exhaust; and

(2) the appellant had failed to demonstrate the existence of exceptional circumstances for leave to be granted. D

[32] We have already adverted to in detail on ground (1) and our views thereof. We would, therefore, deliberate on ground (2) and state our reasons for holding that it is not tenable as a premise to reject leave for JR considering the issues raised by the appellant. E

[33] In regard to whether the appellant had raised in support of the JR application the appellant's position was that the LHCJ had failed the review. It was stressed that the LHCJ failed to acknowledge that exceptional circumstances exist in the present matter that warrant the availability of JR and that tax authorities like all other public authorities or bodies are not immune from being subjected to JR by reference to the Supreme Court case of *Jagdis Singh*. It was held in that case that the existence of exceptional circumstances is evidenced, amongst others, by: F G

> ... a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice ...

[34] It has now been accepted as settled law that a public authority does not have the jurisdiction to commit an error of law when making its decision and if such an error is made, it would amount to a clear lack of jurisdiction that is susceptible to JR (see *Majlis Perbandaran Pulau Pinang; Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748). H I

[35] At the court below, the appellant raised substantive questions of law pertaining to the purported erroneous application of s 33(1) of the ITA and the erroneous application of s 44A(9)(b) of the ITA against the appellant and

s 44A(9)(a) against the appellant's related company, MME.

[36] We would not at this juncture, delve into the merits of the rival contentions supported by authorities pertaining to the above core issues. Suffice for us to express our view that appellant had satisfactorily made out an arguable case of the respondent having committed an error of law and possibly having exceeded its jurisdiction devoid of any legal or factual basis as alleged.

[37] To our understanding, the correct position in law is as proposed by the appellant that at the leave stage the High Court is required only to inquire whether the question that the respondent has exceeded its jurisdiction in arriving at this decision is not in fact frivolous and vexatious in the sense that it is a trivial complaint by a busy body of an administrative error. It has been recognised in several cases that the threshold for granting leave is extremely low, the sole question being whether or not the application is frivolous and/or vexatious. In support of its proposition, the appellant referred to the following authorities:

(a) *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68; [1983] CLJ Rep 271;

(b) *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134; [1986] CLJ Rep 160;

(c) *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296;

(d) *Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2015] 1 MLJ 675; [2014] 9 CLJ 321; and

(e) *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442.

[38] As the appellant had raised serious question of law and/or excess of jurisdiction by the respondent in regard to its impugned decision, we are convicted that the JR application should proceed, beyond the leave stage and should not be rejected summarily on the basis that the issues in dispute should be resolved by the SCIT on appeal. We have not disregarded the decision of the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563 as reflected in the following passage from the judgment of Suriyadi Halim Omar, FCJ as follows:

> [60] Had the respondents filed an appeal before the Special Commissioners, where the onus is on the respondents to establish their position, they will be accorded every opportunity to show where the appellant went wrong. The respondent may request for attendance of witnesses to give evidence on oath and request any witness to produce any books, papers or document which is in his custody or his control necessary for the purpose of appeal. Therefore before the Special Commissioners, the respondents will have all the opportunity to undo what the appellant

determined (see *Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203).

[61] At the completion of the hearing of the appeal, the Special Commissioners shall give their decision in the form of an order known as deciding order, and which in certain circumstances may be final. Either party to the proceedings before the Special Commissioners may appeal on a question of law against a deciding order, or may request the Special Commissioners to state a case (generally known as case stated) for the opinion of High Court. Any dissatisfied party may appeal only up to the Court of Appeal (*Tio Chee Hing v United Overseas (Malaysia) Bhd* (2013) 2 CLJ 910; *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v Kumar Gurusamy* [2011] 2 MLJ 433; (2011) 3 CLJ 241; *Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No 8–31–99 (S) (unreported)).

[39] However, we are of the considered views that the availability of an alternative remedy, namely, the SCIT for the appellant to seek redress for its dissatisfaction with the assessment should not by itself deny the appellant to seek leave for JR when issues of law of some significance tantamount to excess of jurisdiction are raised. We are categorical in our view that as to whether this is an exceptional case amenable to JR is a substantive issue that should be adjudicated at the full substantive hearing of the JR and not at the preliminary stage. The appellant correctly submitted that it is premature for the respondent to object the appellant's application for leave on the availability of domestic remedy at the leave stage.

CONCLUSION

[40] To sum up, we would conclude that based on the material available before the LHCJ at the leave stage, there is nothing to ever suggest that the appellant's application was frivolous or vexatious in any way. It must be reiterated that the grounds raised in support of the instant JR are supported by legal precedents on the applicability of s 33(1) of the ITA. The LHCJ herself did not hold that the appellant had failed to make out an arguable case for JR. It is plain to us that the appellant had satisfactorily met the low threshold for leave for JR to be allowed. In this respect, the LHCJ had arrived at a decision that was flawed.

[41] In the circumstances as aforesaid, we find that there are sufficient merits in this appeal to warrant our intervention. We would accordingly allow this appeal and set aside the decision and order of the High Court. The JR application before the High Court is ordered to proceed for hearing on its merits.

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali